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Corruption risks seen through the OECD Anti- Bribery Convention

by Nicola Bonucci, Director of Legal Affairs OECD Paris

Based on a presentation made in NYC in MAY 2007

The OECD Convention at glance

- Convention negotiated in 1997 and entered into force in 1999
- Today 42 Parties to the Convention (all OECD members and 7 non members, soon two more Parties: Costa Rica and Lithuania)
- Convention exclusively focussed on the supply-side i.e. the active bribery
- A specific feature with respect to implementation: a strong monitoring mechanism

The main elements of the OECD convention

- It apply to the bribing of **foreign public officials** in both contracting parties and non-contracting parties.
- It apply as soon as an offer or promise is made and whether directly or through intermediaries. It apply even in case of third party beneficiary (cf Schering-Plough).
- It applies “irrespective of, *inter alia*, the value of the advantage, its results, perception of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage” (Commentary 7 to Article 1 of the Convention).

Who is a foreign public official under the Convention?

- Point of departure: “**autonomous definition**” provided for in Article 1.4.a of the Convention. The main advantage of this approach is that this removes the “national law variable”.
- The domestic law of the victim state will apply only to determine the field of activity of the official, e.g. to determine whether the person is a member of Parliament or a judge. Whether this means that the person is a foreign public official under the Convention is matter to be determined **EXCLUSIVELY** in light of the Convention’s criteria.

Definition of the Convention

- “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise, and any official or agent of a public international organisation”

Additional definitions provided for in the Convention

- The definition of article 1.4.a raises three questions:
 - What is a foreign country ?
 - What is a public function ?
 - What are a public agency or a public enterprise ?
- The OECD Convention provides an answer to these 3 points, which are particularly relevant for the pharmaceutical sector.

A foreign country

- First: A “foreign country” includes all levels and subdivisions of government from national to local (article 1.4.C of the Convention).
- Second: A “foreign country” is not limited to states, but includes any organised foreign area of entity, such as an autonomous territory or a separate customs territory (Commentary 17).




A public function

- “Includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement” (Commentary 12).
- The act of delegation need not take any particular form. The person can be a public employee or a simple private contractor.
- The Convention is not limited to public procurement: “a doctor entrusted with the giving of an opinion on the admission of a particular medicine to the market under public authorisation procedures “, would be deemed to exercise a public function. (this example is extracted from *The OECD Convention on bribery a commentary*, CUP, 2007)

For a public agency/enterprise

- A public agency is “an entity constituted under public law to carry out specific tasks in the public interest” (commentary 13). Thus a doctor working in a public hospital would be deemed to be a public official.
- A public enterprise is “any enterprise, regardless of its legal form, over which a government, or governments, may directly or indirectly, exercise a dominant influence” (commentary 14).



OECD Convention and Pharma Industry: A basic premise

IN A NUMBER OF COUNTRIES THE
PHARMACEUTICAL INDUSTRY DEALS ,
INDIRECTLY OR DIRECTLY, WITH PUBLIC
OFFICIALS

Three ways in which bribes may be paid

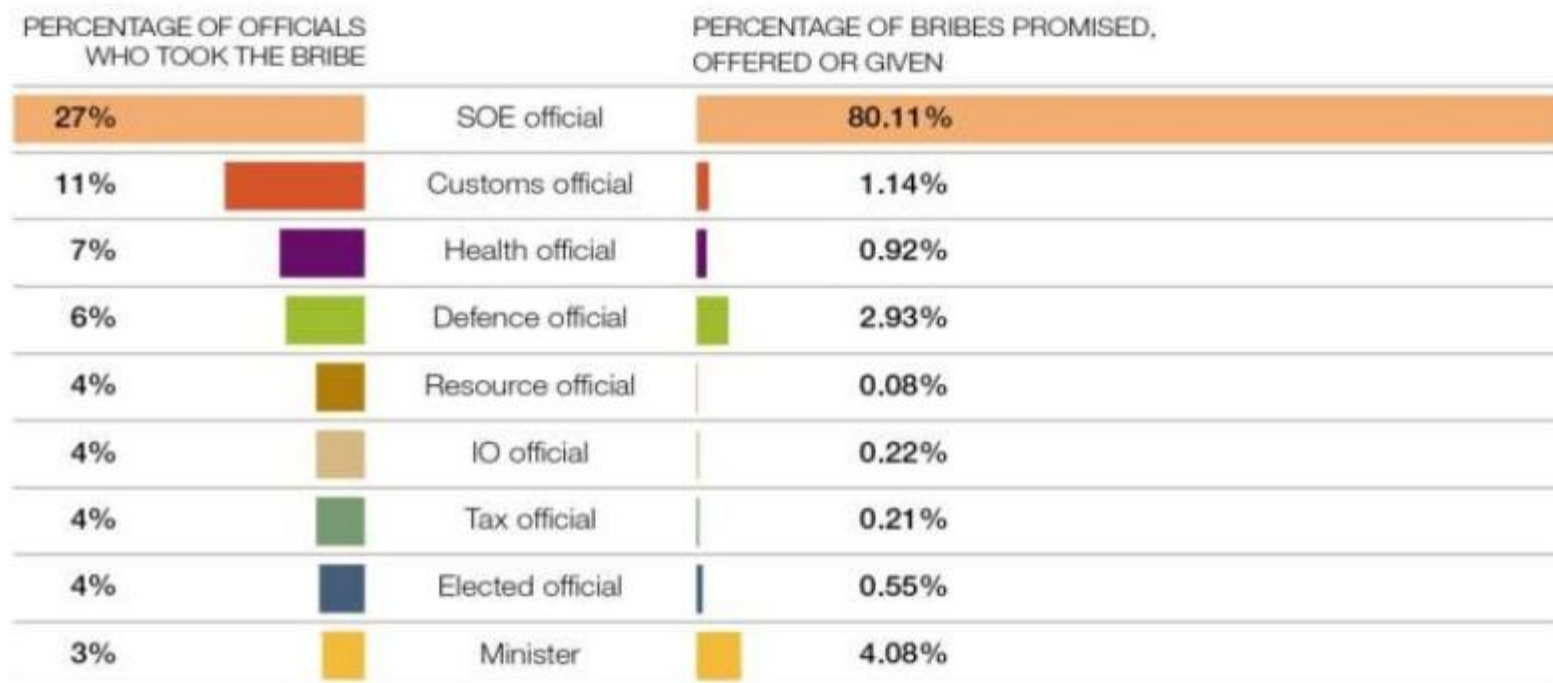
- One is “Pay-to-Prescribe”;
- another is bribes to get drugs on the approved list or formulary;
- and the third is bribes disguised as charitable contributions.

See more at:

<http://www.fcpablog.com/blog/2015/3/3/how-do-pharmas-pay-bribes-the-sec-counts-the-ways.html#sthash.tw4Lwerl.dpuf>

Who is on the receiving end?

SOE officials were bribed in **27%** of cases but received **80.11%** of total bribes. Heads of state and ministers were bribed in a total of **5%** of cases but received **11%** of total bribes.



Enforcement : from 1997 to 2017 a continuum

- Dec 2016: Teva Pharmaceuticals Industries Ltd. agreed with the DOJ and SEC to resolve FCPA violations through a deferred prosecution agreement and total payments of \$519 million.
- In 2016 two other major Pharma companies settled similar charges with US authorities.
- April 2017 Novartis, has been fined 55.1 billion won (\$49 million) and given a six-month suspension of insurance benefits on its nine medicines available here for allegedly bribing doctors.

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Why does the Pharma industry continue to face such difficulties ??

“We identify two tensions that contribute to this disconnect: a culture clash between global and local norms, especially in emerging markets and a similar disconnect between the compliance and commercial functions”

A Bitter Pill? Institutional Corruption and the Challenge of Antibribery Compliance in the Pharmaceutical Sector Elisabeth David-Barrett and others, Journal of Management Inquiry, March 2017



Why ?

“The highly fragmented nature of medicine, where markets are constituted of clinics, surgeries, pharmacists, hospitals to individual doctors means that discretion is very high. Economists often struggle to understand the market: demand (in the form of the diagnosis and prescription) is set by the supplier (the doctor who issues the drugs). The patient (or consumer) is almost entirely subject to these decisions and has little recourse to seek an alternative.”

Jonathan Webb, article in Forbes, February 2016



My explanation

I do not have one but I know who are the
best placed to answer

YOU

To conclude

- The OECD Convention has radically changed the landscape with respect to bribery of foreign public officials.
- Given its wide definition of a public official and the fact that in a number of countries throughout the world the health sector is a public good the chances the risk to act in violation of the Convention are extremely high.
- The increasing level of co-operation between judicial authorities and the exchange of information on on-going cases makes it more and more likely that a case starting in one country (be it on active or passive bribery) will have spill over effects in other countries



THANK YOU

More info on OECD work

<http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

<http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>